

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



ORIGINAL

74-2072

To be argued by  
STANLEY BUCHSBAUM

(41666)

**United States Court of Appeals**

FOR THE SECOND CIRCUIT

No. 74-2072

JAMES RHEM, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON,  
individually and on behalf of all other persons similarly situated,

*Plaintiffs-Appellees,*

—against—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York;  
ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM  
D. BEAME, Mayor, City of New York,

*Defendants-Appellants,*

PETER PREISER, Commissioner of Correction of the State of New York; MALCOLM  
WILSON, Governor, State of New York; and OWEN MCGIVERN, Presiding  
Justice, New York State Supreme Court, Appellate Division, First Depart-  
ment, individually and in their official capacities,

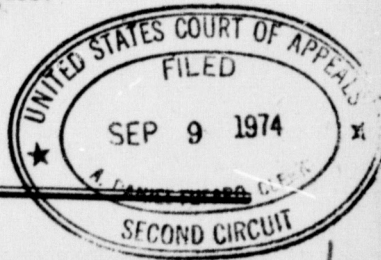
*Defendants.*

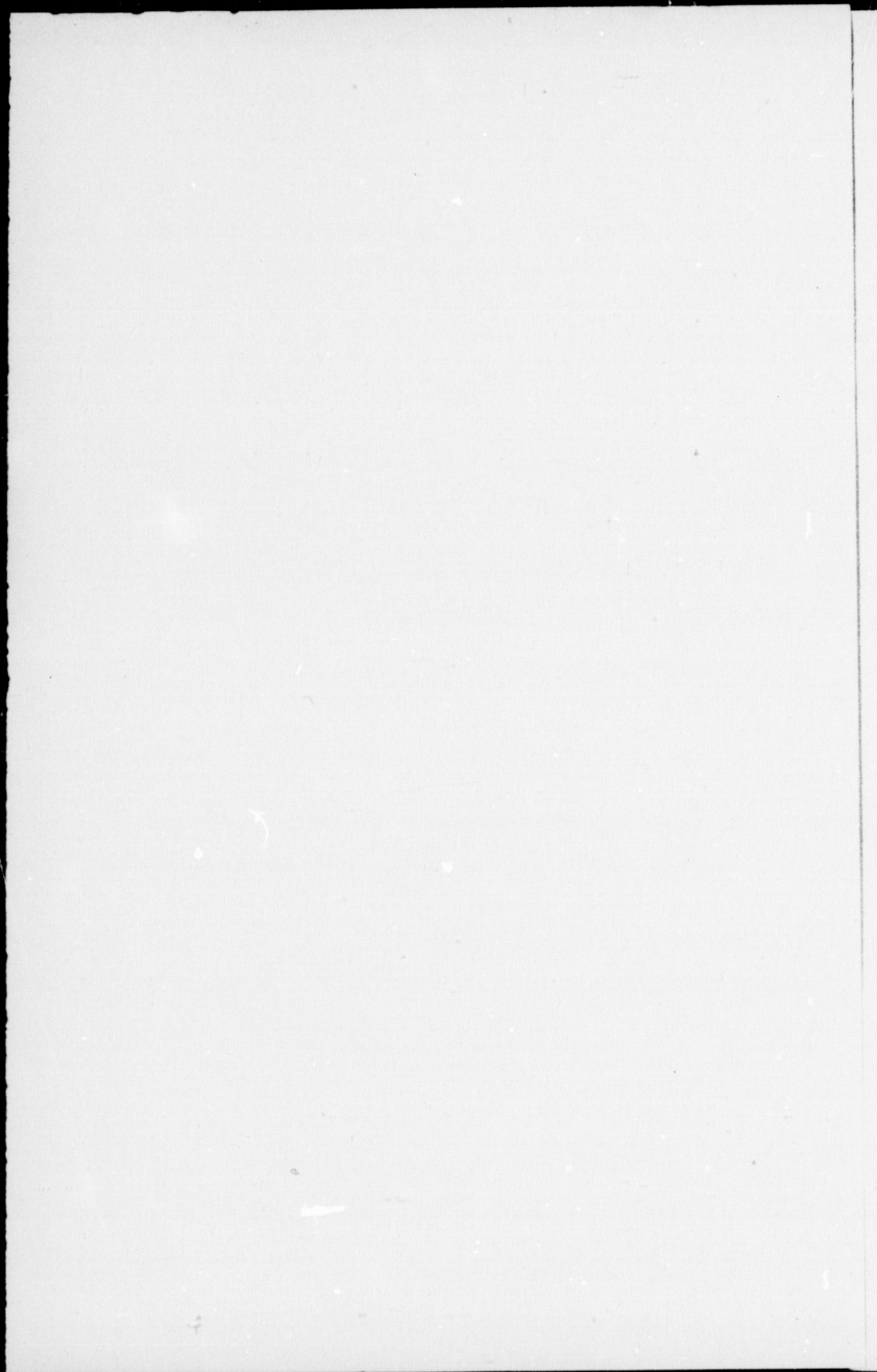
ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**APPELLANTS' BRIEF**

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The order directing the City to submit a “comprehensive, and detailed plan for the elimination of all conditions and practices” declared to be violative of the Constitution within a limited period of time was improper for various reasons. It provided too little time in view of the studies required and the great potential expense. And it constituted an un-

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York State Supreme Court, Appellate Division, First  
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*Defendants.*

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APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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## APPELLANTS' BRIEF

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### Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (LASKER, J.), entered on July 11, 1974, which enjoined ap-

pellants "from confining any persons in the Manhattan House of Detention for Men after August 10, 1974". The order was issued subject to reconsideration by the District Court "at such time as defendants Malcolm, Rubin and Beame [hereinafter "appellants" or "City"] shall submit to the Court a comprehensive, detailed and specific plan for the prompt elimination of all conditions and practices at the Manhattan House of Detention for Men [hereinafter "the Tombs"] declared unconstitutional by the Court in its opinion of January 7, 1974".

This class action was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201. It challenged the constitutionality of conditions under which persons are held in pre-trial custody by the City of New York at the Tombs. The litigation spans four years, during which time the City voluntarily corrected many of the challenged conditions. A settlement of those issues concerning, *inter alia*, overcrowding, unsanitary conditions, and medical care was stipulated to in a consent decree entered on August 2, 1973. The remaining issues were tried by Judge LASKER, who rendered his opinion set forth in the Appendix on January 7, 1974. The opinion is also reported at 371 F. Supp. 594 (S.D.N.Y., 1974).

A judgment granting certain final relief was entered on March 21, 1974. The judgment prohibited appellants and their agents and employees from, among other things, reading any incoming mail addressed to appellees [hereinafter "plaintiffs"] from any court, attorney or public official and from subjecting plaintiffs to any punishment for disciplinary infractions without institutional hearings which had to conform to procedures mandated by Judge LASKER. In addition, the judgment directed the City to sub-

mit to the Court and to plaintiffs' counsel within thirty days "a comprehensive and detailed plan for the elimination of all conditions and practices declared to be in violation of the Constitution of the United States by the Court's opinion of January 7, 1974". A final order relating those conditions was not entered at that time.

### ***Prior Appeal***

The City filed a notice of appeal from the March 22nd judgment on April 19, 1974. The scope of that appeal was limited to the issue of procedural requirements at institutional disciplinary proceedings. This Court, by order dated July 16, 1974, remanded the matter to Judge LASKER for reconsideration and resettlement of his March 22nd judgment in light of the recent United States Supreme Court decision in *Wolff v. McDonnell*, 94 S.Ct. 2963 (1974). *Wolff* dealt exhaustively and in detail with the issue of disciplinary procedures at prisons.

Following remand, Judge LASKER stayed enforcement of his judgment pending his reconsideration. To date, no order regarding the reconsideration of the March 22nd judgment has been issued.

### ***The Present Proceeding***

Pursuant to the direction of the March 22nd judgment, several meetings were held between the parties and the District Court. This office submitted to Judge LASKER a letter which indicated that, because of inordinate cost of such a project, which was far in excess of the City's present budgetary capability, the City could not provide a timetable as to when this project would start.

Thereafter, on July 11, 1974, the District Court entered its final order relating to the balance of the relief requested by the plaintiffs. It enjoined confinement at the Tombs after August 10, 1974. The District Court accompanied this order with a Memorandum in which it outlined the history of the litigation.

Judge LASKER, after noting the City's substantial compliance in settling some of the issues raised in the course of four years, cited the City's failure to comply with his direction for the submission of a plan for eliminating the remaining conditions deemed unconstitutional by the Court.

These remaining conditions are as follows: (a) lack of contact visits; (b) lack of a classification system of inmates at the Tombs; (c) noise; (d) inadequate ventilation; and (e) excessive heat.\* The City decided not to submit a comprehensive, detailed and specific plan to eliminate these conditions because of the short time in which this had to be done under Judge LASKER's March 22nd judgment, as extended, and because, once this was done, it would have to allocate substantial funds, which were not available, to carry it out.

The appellants moved in the District Court for a stay of the enforcement of the July 11th order pending this appeal. This application was denied by Judge LASKER in an order filed August 2, 1974. Judge LASKER did, however, stay his order until appellants, upon filing a notice of appeal, had an opportunity to apply to this Court for a stay pending appeal.

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\* Lack of contact visits and a classification system are inter-related, as are inadequate ventilation and excessive heat.

Appellants brought their application for a stay before this Court on August 13, 1974, the notice of appeal from the District Court's order having been filed on August 6, 1974. This Court, in an order dated August 15, 1974, granted the application for the stay pending appeal on condition that appellants "honor requests to transfer to New York City House of Detention for Men at Rikers Island or other available facility, at the discretion of the Commissioner of the Department of Correction, of inmates of the Manhattan House of Detention for Men who have been heretofore or who hereafter will have been detained 40 days or who hereafter are detained for 14 days". The option to transfer was not afforded to (a) inmates currently on trial; (b) inmates held for mental observation; and (c) inmates determined to be escape risks. Judge FRANKEL dissented only as to the restriction on affording the option to all inmates.\* In addition, an expedited appeal schedule was ordered.

### Questions Presented

It is the City's contention that the present conditions at the Tombs, as well as the current visiting procedure, are not violative of the Constitution, as concluded by Judge LASKER. Even if they were, we assert that Judge LASKER's direction that the City present a comprehensive and detailed plan for the elimination of these conditions involved an excessive intrusion into the details of government and

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\* Pursuant to this order, and on the same day it was issued, August 15, 1974, appellants presented this option to 261 eligible inmates at the Tombs. Of the total 261, 14 elected to transfer; 153 did not request a transfer; and the balance, 94, refused to exercise their option.

was inappropriate in light of the good faith efforts of the appellants to improve conditions at the Tombs, and in light of the City's fiscal inability to commit itself to a comprehensive plan to restructure the institution. Lastly, it is appellants contention that the District Court's order enjoining confinement of persons at the Tombs after August 10, 1974, subject to the stay, is an excessive remedy, causing substantial burdens to be placed upon the City and creating irreparable harm.

The issues thus presented for review are as follows:

1. Did the District Court err in concluding that certain conditions at the Tombs and the visiting procedures thereat constituted violations of the Constitution?

2. Was it proper for the District Court to require appellants to submit a "comprehensive and detailed plan for the elimination of these conditions and practices" within a prescribed, limited period of time?

3. Was it proper for the District Court to order that appellants be enjoined from confining persons at the Tombs after August 10, 1974?

## **Facts**

### **(1)**

Plaintiffs, unconvicted detainees housed at the Tombs, brought this civil rights action. They alleged that various conditions and practices violated their rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments. Their complaint charged the defendants with creating the

following conditions: overcrowding, unsanitary conditions, lack of light and air, excessive noise, mistreatment by guards, arbitrary disciplinary procedures, inadequate medical care, lack of recreation, and restrictions on visiting and mail.

On October 26, 1970, the case was declared a class action. On March 17, 1971, Judge MANSFIELD denied the City's motion to dismiss, and he granted a preliminary injunction ordering the Department of Correction to adopt, publish and distribute to all inmates rules governing inmate behavior and other aspects of inmate life. In addition, the Department was prohibited from interfering with private consultations between inmates and their attorneys in cases in which the Commissioner or his staff are parties.

On December 16, 1971, the Court denied a motion to dismiss by the State defendants.

On August 2, 1973, the consent decree, mentioned, *ante*, p. 2, was entered.

## (2)

At the outset, we note that the physical conditions at the Tombs held to be violative of the Constitution are not now the same as existed when the complaint was served; when the trial began; when the trial ended; and when Judge LASKER rendered his opinion in January, 1974. Some of these conditions, by and large, are created by the inmate population, although we concede that the inherent deficiencies of the building present serious obstacles to completely eliminating all conditions which may be labeled "uncomfortable". With this perspective in mind, the trial testimony may be more appropriately examined.

We shall proceed with a description of the Tombs and then to examine the individual testimony concerning the alleged constitutionally deficient conditions.

(3)

The Tombs is a twelve floor structure, part of a complex which includes the Criminal Courts of the City of New York and the offices of the District Attorney of New York County. It is located in the Civic Center of New York County and occupies an entire City block, with no open space or outdoor area.

The official capacity in 1971 was 902. During the trial its population was approximately 1300, with two and sometimes three in a cell. It now has only one detainee to a cell, with limited exceptions (e.g., suicide risks). This was pursuant to the consent decree of August 2, 1973. The total population as of July 11, 1974, the date of Judge LASKER's final order, was 522. Recent figures have dropped below that number.

Although approximately 80% of the inmates at the Tombs are detainees, the institution is maintained as a maximum security institution. Recent escape attempts, as outlined in First Assistant Corporation Counsel Stanley Buchsbaum's affidavit in support of the application for a stay, dated August 9, 1974, indicate the need for maintaining such strict security at the Tombs.

The inmates are housed in two-storied units of rectangular tiers of cells. Each tier surrounds a central area, known as the lock-out area. When the inmates are in this lock-out area, they cannot return to their cells. A catwalk-gallery, used by prison guards, runs along the inside of the lock-out

area, at the floor level of the upper deck of cells, allowing guards to see both the upper and lower decks. Each cell has a steel-barred door, as do the entrances to the lock-out areas.

Plaintiffs alleged that the lock-in period of 16 hours per day, during which time they had to remain in their cells, was excessive. Their witness, Donald Goff, General Secretary of the American Correctional Association, testified that but for approximately 20%-40% of the inmates who might require maximum security confinement, it was not necessary to keep the rest of the detainees in their cells (T 600; 613).<sup>\*</sup> William vanden Heuvel, the then Chairman of the City Board of Corrections, was similarly critical of the lock-in period, although he believed that a classification system would permit greater flexibility (T 988, 1021-1024).

Commissioner of Correction Malcolm, in his affidavit before the District Court on the application for a stay of the Court's order of July 11, 1974, stated that "lockout hours have been expanded until 10 p.m. and, as originally requested by the inmates, lights are kept on until midnight". Thus the Department has demonstrated flexibility with regard to lock-in time.

(4)

Much of the trial testimony centered on the issue of contact visits. The City contended, as it still does, that security risks would be maximized with contact visits. Plaintiffs presented very distinguished expert witnesses

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<sup>\*</sup> Page references preceded by the letter "T" refer to the pages of the transcript of the proceedings of the trial as they appear in the record.

who testified concerning the psychological impacts of contact and non-contact visits.

Visits occur at the Tombs in special booths under security restrictions. The detainee and visitor are separated by a steel wall and a 20" square pane of bullet proof glass. Communication is by telephone, which presents mechanical problems at times.

Dr. Karl Menninger, noted psychiatrist, was highly critical of non-contact visits (T 859, 862-863, 884). It was his belief that the lack of contact visits contributes to an inmate's instability (T 863). He stated that security risks could be controlled by careful searching of prisoner and visitor (T 869-870), and by psychological evaluations performed by a psychiatrist (T 899). In addition, Dr. Menninger testified that contact visits by certain families would be deleterious to the inmates. Psychological tension would increase with visits by certain individuals (T 897).

In agreement with Dr. Menninger was Dr. August F. Kinzel, a psychiatrist who testified that the visiting system at the Tombs caused prisoner frustration. However, he stated that violent inmates may not always be entitled to contact visits (T 321-322).

Although there was similar testimony from many of the witnesses, including some of the defendant's witnesses, concerning the positive psychological effects of contact visits (T 859), the City asserted that the need for institutional security overrode these considerations (T 1129-1131, 1305-1306).

Joseph D'Elia, Director of Operations of the Department of Corrections, testified that, in contrast to the correc-

tional facility at Rikers Island, the inmates at the Tombs are there only for a short period of time. There is greater tension in the unconvicted, unsentenced inmates, who are unsure of their future, a situation which becomes particularly exacerbated if they are not currently on trial or in communication with their attorney. The sentenced inmates at Rikers and other correctional facilities do not have similar anxieties since their fate has already been determined. It is this heightened anxiety, coupled with the fear of the smuggling in of contraband, which induces the Department to maintain the Tombs as a maximum security facility without contact visits (T 1127-1131, 1289).

Mr. D'Elia testified that contraband has been smuggled into Rikers Island, where contact visits are permitted. Narcotics can be placed in balloons and passed from mouth to mouth during contact visits (T 1242, 1266).

Warden Peter Schaeffer stated that such a risk would arise if the Tombs adopted contact visits. He was asked the following question (T 1305):

"Q. Warden Schaffer, based on your experience, does this finding of weapons in the institution indicate to you that there are people who are desperate enough to attempt to obtain more sophisticated weapons during a contact visit? A. That's my opinion."

Louis S. Aytch, Superintendent of Philadelphia prisons, stated in his deposition of March 16, 1973, that even in the open visiting room area of one of the Philadelphia prisons (an area which does not permit contact, although it is open) attempts to pass contraband had been made

(p. 15 of deposition). Moreover, he believed that it was not feasible to have contact visits at the Tombs.

Aside from the security risk problems generated by contact visits, defense witnesses also pointed out that the Tombs lacked space for accommodating contact visits.

At the time of trial, visits were limited to two per week for 30 minutes each. In addition, they were restricted to evenings. Visits by children were permitted on Wednesdays only.

At the present time, inmates are permitted five visits per week of forty-five minutes duration for each. Visits are now scheduled in the afternoon as well as in the evening, and children may visit at any visiting time (See Malcolm affidavit in support of stay application in District Court, par. 8).

(5)

The environmental conditions challenged focus upon excessive noise, inadequate ventilation and great heat levels present at the Tombs.

There was testimony criticizing the noise level as extremely high. The City's Environmental Protection Agency, using sophisticated noise-measuring instruments, found the volume of noise on the eighth floor to be at least that of the New York City subways system (T 1018). Concededly the building itself leaves much to be desired acoustically. But the situation is aggravated by radio and television sets turned on at the request of the inmates. Noise is also created by the unavoidable clanging of meal trays and cell doors. Both Dr. Kinzel and Dr. Menninger

testified that such high noise levels could have negative psychological effects (T 316, 883, 885).

John L. Anderson, Warden of Northumberland County Prison, Sunbury, Pennsylvania, who visited the Tombs shortly before he testified at the trial, noted that the noise level was high but that the noise was not personally disturbing to him because he was used to prison noise.

The noise level at the Tombs is, to a considerable degree, obviously determined by the extent to which radio and television sets are played, how many cell doors are opened and closed, how many meal trays are clanged, and lastly, how many human voices are heard. Currently, the population at the Tombs is approximately one-fourth of the total in 1970, and approximately one-third of the total in 1972 at the time of trial. The plaintiffs' attorney Mr. Berger stated, at the hearing on the application for a stay before the District Court, that the City "environmental people went [to the Tombs recently] and it [the noise level] was lower [than previous readings]." (T 30 of hearing of July 30, 1974).

Turning next to ventilation and heat, which are inter-related, the testimony indicated that the heat, particularly during the summer months, was very high, at times reaching 100° when the New York heat is intense. (T 441, 610, 929) Inmates testified that, when the heat has not circulated through the building in the winter, it is cold, requiring coats or blankets. When the heat finally circulates, it can become excessive (T 39-40, 728-729, 793-794).

The ventilation system at the Tombs had become clogged with dirt over the years. In addition, the windows had been bolted shut since 1970.

To improve these conditions, the Department opened and screened the housing floor windows, which had theretofore been bolted shut. An expanded maintenance effort was directed towards cleaning the air ducts and servicing the institutional fans. Moreover, 29 additional heating coils have recently been installed (Malcolm affidavit, par. 7).

Plaintiff's testimony was also critical of the lack of light that enters the Tombs because the windows are frosted glass. The psychological effects of such deprivation were underscored by Dr. Teich and Dr. Menninger (T 452, 880).

Recreation time and space were also taken up at the trial. The roof of the Tombs, which is devoted to outdoor physical exercise, is now being altered to provide a bubble covering so as to permit physical exercise all year in all kinds of weather. At the time of trial, the recreation time was limited to good weather conditions. The roof recreational area is scheduled for completion by mid-September 1974.

At the trial, the recreation time of 50 minutes per week was contrasted with a recommended one hour per day of exercise in outdoor exercise yards (T 590). Dr. Menninger noted, however, that not all individuals require physical exercise for mental or physical reasons (T 877). In addition, as Mr. vanden Heuvel pointed out, nothing precludes inmates from exercising in their own cells, particularly now when most cells are only singly occupied.

The size of the lock-out corridor was also criticized at the trial. Dr. Kinzel testified that a violence-prone person needs a 30 sq. foot area in which to function; otherwise he becomes acutely uncomfortable (T 305, 312-314). At the time of trial, the average usable space for each inmate was less than 20 square feet. With the current reduced

population, the institution can now provide 28 to 39.6 square feet per inmate (See Malcolm affidavit, par. 4).

Programmatic activities were few and basically unstructured at the time of trial. Dr. Menninger stated that the lack of programmatic activities produced boredom and idleness (T 883-884).

There are now a number of such programs. The Tombs now has a three phase Educational Program which consists of: (a) Adult Basic Education, geared for men with a poor academic background; (b) English as a Second Language, to improve language skills; (c) High School Equivalency Preparation, designed to help those inmates seeking a High School Equivalency Diploma. The High School Equivalency Examination is given every three months; the passing rate has been approximately 65%.

There has been added to the main library satellite or mini libraries which are stocked with a complete variety of books on a multitude of subjects. In addition, the Tombs has a complete law library for those detainees wishing to work on their own cases or for general use. A law counselor was also appointed to instruct the detainees on how to use the law books. Law classes are being held for this purpose on a daily basis. The law library is open from 8 A.M. to 3 P.M. A photocopy machine is also located in the library for the sole use of the detainees.

The Tombs also has the following programs: music club; drama workshop; art club; outside shows by professional and semi-professional entertainers; movies; legal aid services; and addiction services. Of course, religious services for a variety of ethnic groups are also offered. This list is not complete but it will serve as an example

of the progress which the Department has made in this area. [This information was obtained from the institutional fact sheet for 1974 as well as Commissioner Malcolm's affidavit, par. 5.]

Moreover, where only somewhat more than 10% of the detainees at the Tombs were employed at the time of trial, today 23% to 26% of the detainee population is gainfully employed through the institution's Work Incentive Program (See Malcolm affidavit, par. 5).

The correctional staff at the Tombs was also a subject of scrutiny at the trial. Staff abuses, largely a result of overwork under uncomfortable conditions, were detailed in witnesses' testimony.

The lack of a formal classification system was the subject of considerable testimony at trial. Expert witnesses testified concerning the feasibility of devising such a system at the Tombs as well as the current use of classification programs in facilities outside New York.

The City retained Professor H.H.A. Cooper, Deputy Director of the Criminal Law Education and Research Center of New York University School of Law, to conduct a study as to the classification of inmates at the Tombs (T 1310-1312). Professor Cooper prepared a classification form which was submitted by Commissioner Malcolm to the New York City Corporation Counsel for review. The Corporation Counsel's office concluded "that it hinged largely on asking questions of the inmates which would violate their constitutional rights under the Fifth Amendment" (affidavit of First Assistant Corporation Counsel Stanley Buchsbaum, dated August 9, 1974, submitted in support of appellants' application for a stay in this Court, par. 9).

Mr. Buchsbaum observed that "[p]erhaps these questions could appropriately be asked of prisoners who had already been convicted of crimes, but they were entirely inappropriate for inmates awaiting trial" (*Ibid.*).

The present Warden at the Tombs, Arthur Rubin, has described to this office a rudimentary classification system that is now used at the Tombs. Although, the Tombs is a maximum security institution the classification system now employed is based upon separating from the general population of detainees those inmates who are (1) mental observation cases (based upon their prior conduct or information from their arrest record); (2) homosexuals (based upon their prior record, admissions, or arrest record); (3) escape risks (based upon prior institutional conduct or arrest record); (4) persons in need of special medication; (5) newly admitted drug addicts who are placed in the detoxification program; (6) administrative segregation cases (e.g., notorious underworld figures); and (7) separation cases (e.g., defendants who will testify against co-defendants).

Lastly, we note that, if deprivation to any degree occurs as a result of detention, it is largely a function of the length of stay each inmate individually is confined at the Tombs. Statistics for 1973 recently compiled by the Department indicate the following: (a) approximately 50% of the inmates newly admitted to the Tombs stayed less than 14 days; (b) 71.2% remained at the Tombs for less than 45 days; and (c) 87.5% for less than 120 days (See affidavit of Stuart Chagrin with accompanying chart in support of appellants' application for a stay at the District Court).

### District Court Opinion

Judge LASKER's findings of fact were quite detailed. They appear in the Appendix at pages 119a to 122a.

At the foundation of Judge LASKER's opinion is the fact that plaintiffs are unconvicted detainees who still enjoy the presumption of innocence. His guiding principle is that a person being detained while awaiting trial has "all rights of an ordinary citizen except those necessary to assure his appearance for trial" (371 F. Supp. at p. 622).

Although Judge LASKER noted the technical inapplicability of the Cruel and Unusual Punishments Clause of the Constitution to detainees who have not been convicted and sentenced, he stated "that the maximum security conditions at MHD factually constitute cruel punishment, at least for those in whose cases maximum security is not required" (*id.* at p. 624, fn. 5). He concluded that the due process clause and the equal protection clause could be invoked to protect the detainee against such punishment.

Judge LASKER made the following conclusions of law that are applicable to the appeal herein:

(a) the Tombs does not provide a tolerable living environment for its inmates due to extremes of noise and heat, inadequacy of ventilation and inability to see the sun, sky, or outside world; such deprivations are of constitutional magnitude (*id.* at pp. 627-628);

(b) lack of contact visiting for those inmates who do not require maximum security confinement is inhumane and cruel in fact (*id.* at pp. 625-626);

(c) the right of a prisoner to reasonable physical exercise is fundamental and the plaintiffs are entitled to the relief necessary to achieve that objective (*id.* at pp. 626-627);

(d) the imposition of maximum security confinement (including lock-ins in cells of 16 hours per day) of those detainees in whose cases it is not necessary violates their rights to due process by punishing them although they are unconvicted, and that the first step toward alleviating this condition is to establish a classification system to determine those who do and those who do not require maximum security custody (*id.* at pp. 624-625).

### POINT I

**The conditions at the Tombs and the visiting procedures, while far from being ideal, do not constitute treatment which violates due process.**

#### (1)

It is conceded that the heat, deficiencies in ventilation, and noise at the Tombs make living conditions there very uncomfortable at times. However, the basic question is whether these conditions are at this time so bad as to violate the due process rights of the inmates.

In dealing with this question we shall first discuss the relevant cases.

#### (2)

*Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio, 1971), 330 F. Supp. 707 (1971), *affd. sub nom. Jones v. Metzger*, 456 F. 2d 854 (6th Cir., 1972), involved an action by de-

tainees. The 76 year old jail involved was much older than the Tombs. Three-fourths of the inmates were held in pre-trial detention. Some of the problems in the institution were similar to those at the Tombs.

There was no ventilation or lighting in the cells or the "bullpen" (lock-out) area. Many windows could not be opened. Plumbing problems rendered some cell toilets inoperable. The population was, at times, double the capacity of the institution. This resulted in some prisoners having to sleep on the floor, a condition made worse by leakage from pipes running on the floor. There were as many as four bunks in some of the 6' by 9' cells. The inmates received shaving materials, but there were only two mirrors for the whole population. Food preparation was below health regulations and generally inadequate, considering nutritional balance and caloric content. No provision was made for washing of the clothes of inmates.

Visits were allowed only three hours per week and only on Sunday. They were conducted while standing and speaking through heavy screens. Children under the age of 18 were not permitted to visit. Attorney visits lacked privacy. There were no telephones for inmate use. Medical facilities were primitive, and there were no recreational, educational or social activities. Isolation cells were brutal, and punishment was imposed without due process.

The District Court summed up the conditions as follows (323 F. Supp. at p. 99):

"We may suppose that the constitutional provision against cruel and unusual punishment was directed against such activities. In any event, when the total picture of confinement in the Lucas County Jail is

examined, what appears is confinement in cramped and overcrowded quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts, except with others in the same sub-human state, no exercise or recreation, little if any medical attention, no attempt at rehabilitation, and for those who in despair or frustration lash out at their surroundings, confinement, stripped of clothing and every last vestige of humanity, in a sort of oubliette."

After handing down his first opinion, with its findings, the District Court held further hearings. In its second opinion it rejected the idea of requiring the construction of a new jail, stating that it did not have the power to require public funding for this purpose (330 F. Supp. at 712-713). The Court did direct, in detail, the remedying of conditions in a manner which did not involve substantial expenditures. The only physical change directed was a limited one with regard to lighting (*Ibid.* at pp. 714-721). And it required that a plan be submitted with regard to repairs or remodeling of a very limited nature (*Ibid.* at p. 721).

On appeal, the only issue discussed, aside from those relating to jurisdiction of the federal courts, was one relating to the directions which affected the sheriff's budget and the deployment of guards. The Circuit Court pointed out that all that was required merely involved specified changes in the budget and the assignment of manpower, changes which were necessary and appropriate and which would not appreciably adversely affect the ability of the sheriff to perform the other duties imposed upon him by law.

Apparently no issue was raised on appeal with regard to what conditions violated the Constitution.

The District Court there also required a plan for correcting many of the conditions outlined above. However, in the present case, the City entered into a consent stipulation under which it agreed to correct many of these conditions. By the end of trial here, the issues not resolved by the consent decree were limited compared to those in *Jones v. Wittenberg, supra*.

*Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass., 1973), affd. 494 F. 2d 1196 (1st Cir., 1974), was another action by detainees. Of the population of the jail involved, 85% had not yet been tried. The cells were 8' wide by 11' long, constructed for single occupancy. Although only 142 cells for men were operable, the jail housed, on the average, 340 men. Nearly all of the usable floor space was taken up by two cots in the cell. Yet each day the men were confined to their cells for between 19 and 20 hours.

The jail was 125 years old. The paint was cracking in many places, and the floors were damp. Heat and cold during the respective summer and winter seasons were extreme. Mattresses were soiled and worn; cells were cramped; plumbing was leaky; toilets and sinks were corroded and filthy, and a fecal smell emanated from many toilets; and the water was either scalding hot or ice cold.

The jail was a fire hazard, and infested with mosquitoes, roaches, rats and waterbugs. Pigeons roosted inside the institution.

There was a din which persisted 24 hours a day, and "the noise seemed to increase after midnight and ap-

proached a virtual bedlam which lasted until dawn" (360 F. Supp. at p. 680, fn. 8).

In some sections, floors appeared near collapse. Many of the bathing and showering facilities were broken. Medical care was inadequate, and the food was often cold and unsanitary. The cells were dirty and there was no provision to clean them. Recreation and visiting privileges were, in addition, limited.

This brief description of conditions is pallid beside the lengthier one in the District Court's opinion. It reads like a chapter of a Charles Dickens novel.

The District Court there ordered that no one be confined at the jail after a date more than three years subsequent to that of his opinion. In the meantime, the population had to be reduced, sanitary measures instituted, lock-out time of 4 hours provided, and telephone privileges made available. The conditions at the jail were thus far worse than those which existed at the Tombs even at trial. Moreover, the Tombs was built approximately forty years ago, more than eighty-five years after the jail in that case.

*Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md., 1972) was also a suit by detainees. Eighty per cent of the inmates of the jail were awaiting trial.

Most of the testimony concerned conditions in isolation cells, mail censorship, bad and inadequate food, medical conditions, and disciplinary procedures. Inmates were allowed two 20 minute non-contact visits per week.

The non-contact visits were held not to be violative of the Constitution. It said (344 F. Supp. at p. 279):

"Yet this does not rise to the level of cruel and unusual punishment though expert testimony in this case plus available security alternatives suggest the advisability of reconsideration."

Earlier the Court had stated the applicable test, as follows (344 F. Supp. at p. 265):

"Thus, each of plaintiffs' complaints herein must be weighed and considered in terms of whether they violate the minimal standards established by the guarantees and the proscriptions of our Federal Constitution, not in terms of what this Court might or might not think is the best or the better practice."

In *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Calif., 1972), the Court found the conditions at a jail for detainees to be "shocking and debasing" and violative of due process as a matter of law. Cells for two inmates were tiny (7' by 7') and drab. Confinement in the cells was virtually 24 hours a day, without any recreational or educational diversion except for a few two hour periods per week, during which time the inmates showered, shaved, or received visitors.\* Heat, ventilation and plumbing were all substandard. Conditions in an adjacent facility for convicts were better. There were no educational programs, no library, and no religious services. Visiting hours were restricted to three hours on Sunday.

The Court there ordered the institution of programs for education, recreation and vocational training. In addition,

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\* At the time the opinion was handed down the inmates were permitted to spend the daylight hours in the exercise yard or the day rooms.

it ordered access to a library and a reform of the visiting schedule and "list" of approved visitors.

In *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark., 1971), 358 F. Supp. 338 (E.D. Ark., 1973), 361 F. Supp. 1235 (E.D. Ark., 1973), the Court found inadequate bathing and toilet facilities; no ventilation; less than minimal medical and dental care; no recreational programs or areas; overcrowded, unsanitary and insecure cells; the presence of roaches, rats and poisonous insects; no protection against assaults and homosexual attacks; the use of an isolation cell or "hole"; lack of adequately trained personnel; no classification or separation of detainees; inadequate bedding; and no laundry facilities.

Conditions were so bad that the defendants stipulated that " \* \* \* the general conditions presently existent at the Pulaski County jail \* \* \* taken as a whole do not meet minimum federal constitutional requirements with respect to prisoners' rights to due process of law and to be free from cruel and unusual punishment.'" The Court there directed that an interim plan for upgrading the facility be presented until a new facility is built.

In *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo., 1973), federal "prisoners" brought an action against the authorities in control of the St. Louis city jail where they were housed pursuant to a federal-state contract. Eighty-five percent of the inmates were pretrial detainees. The population far exceeded the jail's capacity. The two-man cells in this sixty year old jail were 8' 2" long, 5' 2" wide and 8' 2" high. At various times there were three prisoners in such a cell or a smaller one.

Clothing was not provided for the inmates, who also never engaged in fresh air exercise, nor received psychiatric services. Some prisoners had to sleep on the floor; linen, when distributed, was unclean; the floor was damp. There were no educational programs, no library, and no law books were available. Moreover, there were no telephone privileges, and visiting hours were only two hours per week. There was also inadequate medical care and substandard sanitary conditions for food preparation. Solitary confinement cells were used for disciplinary purposes.

There, the Court ordered that the population be reduced and that only two be housed in a cell. It required that clean bedding be provided for the inmates. In addition, corporal punishment was prohibited and new disciplinary and mail rules were ordered instituted.

In *Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La., 1970), convicted inmates complained of, *inter alia*, overcrowding (six to eight in a cell 13' by 8½' by 7½', with some sleeping on the floor) and inadequate sanitary and medical care. There, the prison was functioning at double capacity; sinks and toilets were rusted and unclean; there was no interior lighting in the cells; mattresses were unclean; inmates had to sleep on the floor; ventilation was poor and heat excessive. In addition, the prison was infested with rats, mice and roaches; the kitchen was unsanitary; bathing facilities were inadequate; the structure itself was a fire hazard; medical care was virtually non-existent. Moreover, there was no isolation of violent, psychotic or homosexual inmates even though there were frequent assaults.

The Court ordered (*Hamilton v. Landrieu*, 351 F. Supp. 549 [E.D. La., 1972]), that medical care had to be upgraded,

recreation programs instituted, population reduced and a classification system and educational program devised. It also directed a variety of other reforms.

(3)

To a very large extent the cases described in the prior subsection based their determination that the inmates were being deprived of their constitutional rights on the totality of conditions in the jails involved. Some individual practices, generally easily remedied, were directed to be remedied. There does not appear to be any case that rested its conclusion of constitutional deprivation on a condition resulting from the structural nature of the building and which required substantial expenditures to remedy it. We will assume, however, that, if a condition resulting from the nature of the structure results in inhumane conditions, it would constitute a deprivation of constitutional rights and would warrant a direction that it be remedied even though the expense of remedying it might be substantial.

It is true that a central theme of these cases is that a person detained while awaiting trial should have the same rights as one arrested and released on bail except to the extent deemed necessary to insure attendance at trial and to protect the security of the institution in which he is detained. Undoubtedly this broad principle is sound. It is, however, a generalization which leaves much to be filled in when it comes to applying it.

Obviously the living conditions of persons out on bail vary widely. It is equally evident that no jail can provide each inmate with living conditions analogous to those he would have if he were not incarcerated. Some, if free, might dwell at the Plaza Hotel or in a Park Avenue duplex.

Others might barely exist in a rundown bedroom of a crowded apartment in a poorly maintained slum tenement.

In any event, incarceration in a jail can never come close to resembling freedom to roam a city, town or village. Statements that those who are awaiting trial should have living conditions better than those provided for convicts necessarily must be treated as mere homilies when a pre-trial inmate is, for good reasons, confined in a jail in the heart of a metropolis. For example, large outdoor recreation areas and playing fields usually can readily be provided at a prison located in a rural area. This cannot be done at a jail in the midst of a city except at an expense that defies reason.

In addition, limiting conditions which necessarily result from the need for security of a jail in a city are quite different from those that have to be imposed at a rural prison where the walls can be placed at a substantial distance from the housing structure and the prisoner, even if he escapes, is much more likely to be recaptured promptly than the one who escapes from a city jail.

#### (4)

With this in mind, let us turn to the conditions at the Tombs at the time that the order appealed from was entered to consider whether they reached the level of constitutional deprivation. We shall first deal with particular conditions and then with the totality of these conditions.

##### **a. Heat and Ventilation**

Judge Lasker found that at the Tombs, in the warm months, "temperatures can reach 100° when the New York heat is intense" (371 F. Supp. at 609). The specifics of

this finding is based largely on testimony at the trial of one inmate (T 441, 610. 928-929).

Many New Yorkers, however, work at places where the temperature reaches 100° or close to it on days when the heat is intense. In an affidavit in support of the application for a stay submitted to the Court in the present case it was pointed out that most of the lawyers and the clerical staff of the Corporation Counsel's Office who occupy rooms on the west side of the Municipal Building, where the afternoon sun is not impeded by other buildings, are not provided with air conditioning and manage to perform their work on hot days when the temperatures in their offices approach 100° (Affid. of Stanley Buchsbaum, par. 7). Those whose duties or occupation requires them to walk on sunny streets in the hottest of weather—such as street vendors, messenger and delivery men, patrolmen and sanitation men—have to endure temperatures often far in excess of 100° [bear in mind that official temperature readings are taken in the shade].

Surely, in a City where most of its residents lack air conditioning at their places of work or at their homes or both it is not a constitutional deprivation to fail to provide air conditioning for inmates of a jail, albeit they are merely awaiting trial on criminal charges.

It also should be borne in mind that the correction officers at the Tombs also perform their work in the same heat as the inmates.

It is true that at the outset of the trial the ventilation system at the Tombs was not operating properly because it was plugged with dirt; and certain windows were bolted shut as a security measure (371 F. Supp. at pp. 609-610).

This contributed to the heat in the summer. In the winter, the District Court found, it kept the heat from circulating fully until "late morning hours" so that inmates must wear coats or blankets before that time; and, once the artificial heat is effective, it becomes excessive, one witness testifying that he could not sleep at night because of the heat.

Before the order appealed from had been entered, steps had been taken to clear the clogged ducts although it is doubtful that this will be completely successful; and the sealed windows have been opened. The extent that this will improve conditions is still largely unknown.

#### **b. Noise**

Before or during the trial noise-measuring instruments showed noise levels to be at least that of the New York City subway system. Judge Lasker's opinion states that such noise levels are fairly constant during all waking hours (371 F. Supp. at p. 607).

The noise is largely the result of two factors. One is the nature of the jailhouse—essentially all concrete and steel with little to absorb sound. The other is the sound from television and radio loudspeakers, played for the entertainment of the inmates; the clanking of steel doors; the sound of steel meal trays and metal food utensils; and the sounds of moving garbage cans.

There are indications that the noise level has decreased somewhat now that the population of the Tombs has been reduced from 1301 in October 1972 to 522 at the time of the order appealed from and less than that in August of this year (T 30 of hearing of July 30, 1974).

In any event, the noise, even as it was at the time of the original test, should not be treated as violative of the Con-

stitution. Concededly such noise is not desirable, but many New Yorkers have to endure similar noise levels even when they are not riding in the subways and even though they are not transit employees. This is true of those who live or work close to building or subway construction sites. Obviously it is true of those who work at such sites. And, as was pointed out in an affidavit in support of the application for a stay made to this Court, it was true for a long time for those in offices on the east side of the Municipal Building (Affid. of Stanley Buchsbaum, par. 9).

In considering whether the noise at the Tombs violates due process rights, it is proper to take into account that the average stay at the Tombs of an inmate is only about two months.

**c. Contact Visits and Classification**

The District Court directed that a classification system be devised as a first step toward easing certain restrictions and permitting contact visits (371 F. Supp. 606, 617-620, 621 [item 5], 624-625). His opinion noted that Professor Henry H. A. Cooper, Deputy Director of the Criminal Law Education and Research Center of New York University School of Law, had been retained by the City to prepare a method of classification (*id.* at pp. 598, 618).

Professor Cooper did prepare a report and a proposed method of classification. The method hinged on a form which necessarily had to be based on interviews with inmates. As was pointed out in an affidavit to this Court on the City's application for a stay, the classification form was submitted for review to the Corporation Counsel by the Commissioner of Correction. Attorneys in the Corporation Counsel's Office reviewed it and reached the

conclusion that it hinged largely on asking questions of the inmates which would violate their constitutional rights under the Fifth Amendment. Perhaps, these questions could appropriately be asked of prisoners who had already been convicted of crimes, but they were entirely inappropriate for inmates awaiting trial. The questions apparently were derived from forms used in prisons where convicted persons are confined.

In a report of the New York City Board of Correction entitled "Report on the Future of the Manhattan House of Detention," dated August 6, 1974, there is a summary of testimony given before that body. It includes the following concerning Professor Cooper's plan (pp. 29-30):

"Judge Irving Younger, then Chairman of the Committee on Penology of the Association of the Bar of the City of New York, testified at the hearings that his committee had reviewed Professor Cooper's proposed classification scheme and had found it 'basically defective.' According to Judge Younger's testimony,

We find that it's defective for essentially four reasons. The first of these reasons is that the entire thing is irrelevant. The second of these reasons is that the entire thing is unreliable. The third of these reasons is that the entire thing is unconstitutional, and the fourth of these reasons is that, therefore, it will not work.

We share the committee's judgment."

It seems clear that contact visits could not possibly be authorized at the Tombs without the use of a reasonably accurate and effective classification system to screen out

those who are escape risks. Even then it might open up excessive dangers of escapes.

Judge Lasker deprecated the City's worries about the dangers of escapes, stating that there has been only one escape in the history of the Tombs (371 F. Supp. at pp. 606, 625-626). The record of what has occurred since his opinion was handed down on January 7, 1974, both at the Tombs and other places of detention in New York City, shows how mistaken his optimism was. This record is detailed in an affidavit submitted on the application for a stay made by the City to this Court. It reads as follows (Affid. of Stanley Buchsbaum, par. 9, pp. 7-8):

"Within the past half year a number of persons were caught in manholes close to the Tombs, obviously intending to help in the escape of prisoners. On another occasion seven prisoners escaped from the Tombs after a hacksaw was smuggled into them by a woman visitor.

On April 17, 1974 some visitors to the Tombs brought with them, in a satchel, an acetylene torch and a tank of fuel. They escaped the notice of the guard on the ground floor and went up to the second floor. With a gun they overcame a guard on that floor and took his revolver from him. When another guard approached they overcame him also. They began to burn a hole through the steel barrier which separated the inmates from the visiting area. Fortunately, the fuel in the tank was exhausted before they completed cutting the hole.

On May 6, 1974, nine prisoners escaped from confinement on Rikers Island. Four of them were caught on a barge; two drowned; two were caught while still

on the Island; and one was caught at home. The ninth escapee has still not been apprehended. On June 13, 1974 three inmates at the Adolescent Center on Rikers Island escaped, but all of them were caught before they could get off the Island.

On or about August 6, 1974 a visitor to the Brooklyn House of Detention was discovered to have hacksaw blades and cutting oil hidden in her shoes. This discovery was made by the use of an x-ray machine similar to those now used at many airports."

It should be noted that the parallel drawn by Judge Lasker between the Tombs and the Federal House of Detention in New York City (371 F. Supp. at pp. 603-604, 605, 625) is not a valid one. The Tombs houses many inmates who are charged with violent crimes and who are greater security risks. The inmates in the Federal House of Detention are almost overwhelmingly people who are not charged with violent crimes and who, therefore, create much less security risk. Even so, the newspapers in the past few years have reported a number of escapes from the Federal House of Detention.

Contact visits are undoubtedly highly desirable where they can be provided without risking the security of a jail, but we are aware of no case that has held that a failure to provide them reaches the level of a violation of the Constitution. The lack of such visits at the Tombs is less onerous than at other places of detention since the average stay of an inmate is only about two months.

The conditions discussed under the subheadings a, b and c above cover essentially all that Judge Lasker rested on in issuing the order appealed from. They are the ones

which would, if they are to be remedied, require alteration of the Tombs.

We submit that their existence individually does not reach the constitutional level. Nor do they, considered collectively, create such inhumane conditions at the Tombs as to be of the magnitude of cruel and unusual punishment or violative of due process.

(5)

Judge Lasker recognized that the Eighth Amendment was inapplicable to those detained pending trial and relied instead on the Due Process Clause.

However, he did conclude that the maximum security confinement at the Tombs constituted cruel punishment "at least for those in whose cases maximum security is not required" (371 F. Supp. at p. 624, f.n. 5).

The conditions at the Tombs we are dealing with do not constitute "cruel and unusual punishments" within the meaning of the Eighth Amendment clause. To come within it requires affirmative infliction of punishment which is "barbarous" or "shocking to the conscience". *Furman v. Georgia*, 408 U.S. 238, 274 (1972); *Sostre v. McGinnes*, 442 F. 2d 178 (2d Cir., 1968), cert. den. *sub nom. Sostre v. Oswald*, 404 U.S. 1049 (1972), 405 U.S. 978 (1972). Here, the conditions were not inflicted upon inmates individually. The correction guards themselves are essentially subject to the same conditions. This is not a case where conditions of an actual punishment inflicted upon an inmate or many inmates are below standards of human decency. Inmates are *detained* at the Tombs to secure their appearance at trial; they are not confined there as a form of punishment.

If the conditions of the facility are uncomfortable, this is not tantamount to punishment, let alone cruel and unusual punishment. It is only when the prison authorities affirmatively deny basic human decencies (sanitation, food, medical care, visits, privacy), that a charge of cruel and inhuman punishment is justified. The cases cited in subdivision 2 above demonstrate this observation.

Justice BRENNAN, in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), the landmark case discussing capital punishment as cruel and unusual punishment, stated (at p. 270):

"At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment, is cruel and unusual, therefore, if it does not comport with human dignity."

Moreover, a clear showing of arbitrary, vindictive, and cruel and inhuman punishment must be made for a court to step in. *Roberts v. Pegelan*, 313 F. 2d 548 (4th Cir., 1963); *Graham v. Willingham*, 384 F. 2d 367 (10th Cir., 1967).

What is perhaps most significant in considering the validity of plaintiffs' charges of cruel and unusual punishment is the result of the survey, reported in the press, conducted immediately after this Court issued its order granting appellants a conditional stay. The conditions of the stay were that inmates, with the exception of those who fell into three categories, would be allowed to elect to transfer from the Tombs to another facility of the

Department after a certain period of time. The survey results were as follows. Of the total of 261 eligible inmates, 14 elected to transfer; 153 did not request a transfer; and 94 refused to exercise their option.

A violation of the Cruel and Unusual Punishments Clause requires inhuman, indecent infliction of punishment. It is hard to conceive that other considerations (e.g., convenience of family and attorney visits and proximity to court) could outweigh a desire to leave a facility that has conditions which are barbarous, inhuman and shocking to the conscience. It seems apparent that, if the conditions were so bad, all of the eligible inmates, or at least a significantly high number of them, would have welcomed the opportunity to leave.

Finally, a delicate balance is always sought to be achieved between inmate rights and prison security. This balance is applicable even with respect to such fundamental rights as freedom of religion and medical care. See *Moore v. Ciccone*, 495 F. 2d 574 (8th Cir., 1972); *Sharp v. Sigher*, 408 F. 2d 966 (8th Cir., 1969); *United States v. Wyandotte County, Kansas*, 343 F. Supp. 1189 (C.D. Kansas, 1972); and *Taylor v. Sterrott*, 344 F. Supp. 411 (N.D. Tex., 1972).

## POINT II

The order directing the City to submit a "comprehensive, and detailed plan for the elimination of all conditions and practices" declared to be violative of the Constitution within a limited period of time was improper for various reasons. It provided too little time in view of the studies required and the great potential expense. And it constituted an unnecessary and excessive intrusion by the Court into the details of government.

The order directing the closing of the Tombs by August 10, 1974, is an excessive, unreasonable and improper action.

### (1)

Even assuming that there were a basis for finding that conditions at the Tombs were violative of the Constitution, the order appealed from was improper.

It provided too little time in which to submit a comprehensive and detailed plan in light of the studies required and the potential expense. Originally the order entered on March 22, 1974, merely gave the City thirty days to come up with such a plan. Later, extensions were granted to June 15, less than three months after the original order.

To understand why this amount of time was inadequate it is necessary to consider what was involved. The plan would have to provide for alterations of the Tombs or some alternative. A superficial study revealed that the alterations of the Tombs would cost between seventeen and twenty-five million dollars (App. 187a). Before making a decision to attempt to raise so much money to alter the

Tombs and merely end with an improved but not a modern jailhouse, prudence called for the exploration of alternatives. One such alternative was the construction of a new jailhouse, meeting the most modern of standards. Another was to provide facilities at Rikers Island. All of this required substantial time.

The alteration of the Tombs had to be further explored. Determinations had to be made as to whether there should be other changes as part of the alteration work and, in any event, outside experts would have to be employed to assist the Department of Public Works in making a more detailed study and a more accurate estimate of cost. A study was also needed to determine potential sites for a new jailhouse and to determine what it would cost. And a similar study of both feasibility and cost of using Rikers Island would have to be made.

Only then could a reasoned and responsible decision be made. It needs no argument to show that far, far more than thirty days or three months would be required. Yet Judge Lasker strongly criticizes the City for failing to produce the plan within the limited time he provided. To do so, it would have had to commit itself to somehow raising and spending \$17 to \$25 million without proper study and consideration.

It may be argued that all the City had to do was to come up with a plan, but the plan had to be "comprehensive and detailed." And there can be no doubt that, once the plan was submitted, Judge Lasker would have set deadlines for performance in accordance with the plan. Thus, there would be little chance for altering the plan and none for deciding on an alternative.

In *Inmates of Suffolk County Jail v. Eisenstadt, supra*, 360 F. Supp. 676, the Court made no such attempt to control how the defendants remedied the unconstitutional conditions. It merely ordered that no one be confined in the 125 year old, broken-down institution after a date three years subsequent to the date on which the opinion was handed down.

(2)

Judge Lasker's actions in this case are, in our opinion, a prime example of excessive and improper intrusion into the details of government. The Court took charge of all sorts of matters that belong within the jurisdiction of the executive and legislative arms of government. It could have directed that conditions be remedied by a reasonable date without assuming powers properly belonging to other branches of government.

True there are cases which can be cited to justify the Court's action, but they are cases which, we submit, will have to be reconsidered if our basic system of government is not to be eroded. It is notable that Judge Weinstein in the Eastern District started to act in a similar manner in his first opinion in *Hart v. Community School Board*, but, by the time of his second opinion in that case he beat a retreat, saying:

"As institutions with limited powers, courts are mandated by law and tradition to interfere as little as possible in the work of other branches of government. So long as the Constitution and laws are not violated, state school officials must be afforded the broadest latitude to meet their educational responsibilities.

A majority of the Supreme Court just yesterday reaffirmed its mandate of deference to local school board judgment when it wrote:

[L]ocal control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs and encourages 'experimentation, innovation and a healthy competition for educational excellence.'

*Bradley v. Milliken*, — U.S. —, —, — S. Ct. —, —, — L. Ed. 2d —, — (1974).

With the proviso that any program employed must promise 'realistically to work,' *Green v. County School Board*, 391 U.S. 430, 439, 88 S. Ct. 1689, 1694 (1968), local authorities retain wide discretion to choose among acceptable programs of desegregation. In 'this field the way must always be left open for experimentation.' *United States v. Montgomery Co. Board of Education*, 395 U.S. 225, 235, 89 S. Ct. 1670, 1675 (1969); *see also*, e.g., *United States v. Jefferson Co. Board of Education*, 380 F. 2d 385, 390 (5th Cir.), *cert. denied*, 389 U.S. 840, 88 S. Ct. 72, 77 (1967); *Moss v. Stamford Board of Education*, 350 F. Supp. 879, 880 (D. Conn. 1972); *United States v. Midland Independent School District*, 334 F. Supp. 147, 148 (W.D. Tex. 1971); *Yarbrough v. Hulbert-West Memphis School District No. 4 of West Memphis, Ark.*, 329 F. Supp. 1059, 1064 (E.D. Ark. 1971); *Bradley v. School Board of City of Richmond, Va.*, 325 F. Supp. 828, 832-833 (E.D. Va. 1971); *Brice v. Landis*, 314 F. Supp. 974, 977 (N.D. Cal. 1969)."

We may be told that this Court lacks jurisdiction to review relief granted by a District Court except where clearly

erroneous. We feel justified to be so bold as to say that this is most pernicious doctrine. In a land of checks and balances and one in which one relies on the judiciary to rein excesses, it bogs reason to be told that a District Judge may be guilty of excesses which cannot be checked by the appellate courts. Such a rule gives too much power to each District Judge, subject only to his own self-restraint.

### CONCLUSION

**The order appealed from should be reversed and the District Court directed to take no action to remedy the conditions on which it was based. In the alternative, the order should be reversed and the District Court directed to provide a more appropriate remedy.**

September 9, 1974.

Respectfully submitted,

ADRIAN P. BURKE,  
*Corporation Counsel,  
Attorney for Appellants.*

STANLEY BUCHSBAUM,  
L. KEVIN SHERIDAN,  
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*of Counsel.*

STATE OF NEW YORK  
COUNTY OF NEW YORK

being duly sworn, says:

at No. 15

of the annexed 10

the Attorney for the State

3 COPIES  
of the same to

Sworn to before

day of \_\_\_\_\_

Form 310-3M-1022026 (27)

ORR  
YORK } ss.:

**Chester Mitchell**

that on the 9 day of SEPT 1974  
at New York in the Borough of MANHATTAN in New York City, he served a copy  
of Plaintiff's Brief upon JOEL BERGER Esq.  
Plaintiff's Attorney in the within entitled action, by delivering  
a person in charge of said Attorney's office, and leaving the same with him.

me, this 9 day of SEPT 1974 }  
Dennis J. Conroy

Dennis J. Conroy  
DENNIS J. CONROY  
Notary Public, State of New York  
No. 03-0737300  
Qualified in Bronx County  
Commission Expires March 30, 1975